

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 19, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP2129**

**Cir. Ct. No. 2013SC845**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STEVEN HANSON,**

**PLAINTIFF-APPELLANT,**

**V.**

**EMILY THORUD,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment and an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Modified and, as modified, affirmed.*

¶1 STARK, J.<sup>1</sup> Steven Hanson, pro se, appeals an eviction judgment and an order denying his motion for reconsideration. Hanson argues: (1) the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

circuit court erred by failing to award the full amount of wrongful holdover damages; and (2) the court exceeded its authority by determining his award would be deducted from his tenant's security deposit without Hanson's consent before the twenty-one-day accounting period passed. We agree with both of Hanson's arguments and modify the court's judgment and order. As modified, we affirm.

### **BACKGROUND**

¶2 Hanson leased an apartment to Emily Thorud on a month-to-month basis. Rent was \$450 per month, and Thorud paid a \$450 security deposit. Pursuant to the written lease, rent was “due 5 days before the first day of the month for which the rental amount applies.” On July 25, 2013, Thorud contacted Hanson to inform him she could not pay rent until August 1. Hanson agreed to accept the late rent payment. When Hanson visited Thorud on August 1 to collect the rent, Thorud did not have any money for Hanson. While at Thorud's unit, Hanson also observed “fresh holes” in the drywall, which Thorud stated were caused by a falling chair.

¶3 As a result, on that same date, Hanson posted and sent by certified mail a five-day notice to remedy the default or vacate the premises. *See* WIS. STAT. § 704.17(1)(a).<sup>2</sup> The notice informed Thorud that her tenancy would be terminated on August 6, 2013, if she failed to pay her rent and either repair the

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<sup>2</sup> WISCONSIN STAT. § 704.17(1)(a) provides, in relevant part:

If a month-to-month tenant ... fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly ....

drywall or pay Hanson to make the repair. Thorud never paid any rent to Hanson, and her tenancy was terminated. Hanson thereafter filed the present eviction action against Thorud, alleging she was an unlawful holdover tenant and seeking compensation for the unpaid rent and wrongful holdover.

¶4 At the eviction hearing on September 12, Thorud testified she vacated the premises on August 8. Hanson, however, testified Thorud did not vacate until August 23. Thorud then qualified her testimony by explaining she stopped residing in the unit on August 8, but still had some personal belongings in the unit and also had her father come to the unit to repair the drywall. She stated, “[T]hat was probably the 23rd or whatever, and that’s the last I had ever been there. The only reason I was there was to get my stuff.” Thorud also conceded she received the notice to pay or vacate on August 1, and she testified she never paid any rent to Hanson.

¶5 Hanson requested the court award twenty-six days’ unpaid rent for August, which at a prorated rate of \$15 per day, amounted to \$390 of unpaid rent. He also contended Thorud had been an unlawful holdover tenant for twenty-one days, and he requested the WIS. STAT. § 704.27 statutory remedy of double daily rent for wrongful holdover, which amounted to an additional \$315.

¶6 The circuit court asked Hanson how much of Thorud’s security deposit remained on file. Hanson explained the entire security deposit, or \$450, remained on file because his twenty-one-day accounting period for the security deposit had not passed.

¶7 The circuit court awarded \$450 to Hanson in damages, which consisted of \$390 for twenty-six days of unpaid rent and an additional \$60 for four

days of wrongful holdover. It explained it would not order the full amount for wrongful holdover because:

I believe that Ms. Thorud did make a good-faith effort to vacate the premises back ... on or about August 8th. There w[ere] some issues with some of her personal effects being left in the premises, however she was also ordered to make repairs and she came back to try to make repairs with the assistance of her father. So I don't view this as a situation where she simply held over without cause or without explanation.

The court directed Hanson to use the \$450 security deposit to cover the unpaid rent and holdover award.

¶8 Hanson moved for reconsideration, arguing the circuit court erred by refusing to award the full amount for wrongful holdover. He emphasized WIS. STAT. § 704.27 provided the landlord “shall recover as minimum damages twice the rental value apportioned on a daily basis” for wrongful holdover. *Id.* Hanson also argued the circuit court erred by applying Thorud’s security deposit toward the unpaid rent and holdover award because the twenty-one-day accounting period had not passed and he had not yet calculated and deducted from Thorud’s security deposit any damage to the unit.

¶9 The circuit court denied Hanson’s motion for reconsideration. It reasoned Hanson “was awarded only partial holdover damages because of his repeated assistance [sic] and demand that [Thorud] ... either remain or return to the premises to repair claimed damages[.]” It also reasoned it properly ordered Thorud’s unpaid rent and holdover award to be taken from the security deposit because a landlord is permitted to withhold unpaid rent from the security deposit. *See* WIS. STAT. § 704.28(1)(b).

## DISCUSSION

¶10 On appeal, Hanson renews his argument that the circuit court erred by failing to award the full amount of wrongful holdover damages. He argues he is entitled to the full statutory damage award and that, contrary to the court’s reasoning in its denial of his motion for reconsideration, he never insisted Thorud remain at the property after her tenancy was terminated. Hanson also renews his argument that the circuit court exceeded its authority by ordering Thorud’s security deposit be used to satisfy the unpaid rent and holdover award without Hanson’s consent when the twenty-one-day accounting period had not passed.<sup>3</sup>

¶11 Determining damages is within the circuit court’s discretion. *J.K. v. Peters*, 2011 WI App 149, ¶32, 337 Wis. 2d 504, 808 N.W.2d 141. “We will not reverse the trial court’s findings of fact on damages unless they are clearly erroneous.” *Id.* “Whether the trial court applied a proper legal standard in determining damages is a question of law[,] which we review de novo.” *Id.* (quoting *Three & One Co. v. Geilfuss*, 178 Wis. 2d 400, 410, 504 N.W.2d 393 (Ct. App. 1993)). Further, whether a circuit court exceeded its authority is a question of law we review independently. See *George v. Schwarz*, 2001 WI App 72, ¶11, 242 Wis. 2d 450, 458, 626 N.W.2d 57.

¶12 When Thorud failed to pay her rent after receiving Hanson’s five-day notice to pay or vacate, Thorud’s tenancy was terminated pursuant to WIS. STAT. § 704.17(1)(a). When Thorud then also failed to vacate within the requisite time period, Thorud became an unlawful holdover tenant.

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<sup>3</sup> Thorud did not file a brief and we therefore review the court’s decision without her input.

¶13 WISCONSIN STAT. § 704.27, titled “Damages for failure of tenant to vacate at end of lease or after notice,” provides:

If a tenant remains in possession without consent of the tenant’s landlord after ... termination of a tenancy by notice given by ... the landlord ... the landlord shall, at the landlord’s discretion, recover from the tenant damages suffered by the landlord because of the failure of the tenant to vacate within the time required. In absence of proof of greater damages, the landlord *shall recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession* ....

(Emphasis added.) Based on § 704.27, it is clear that Hanson is entitled to double rent for each day Thorud remained in possession of the property as an unlawful holdover tenant. The circuit court’s determination that Thorud made a good-faith attempt to vacate the property or that Hanson asked Thorud to repair the drywall are not bases for the circuit court to reduce the minimum damages to which Hanson is entitled under § 704.27. *See also Vincenti v. Stewart*, 107 Wis. 2d 651, 656, 321 N.W.2d 340 (Ct. App. 1982) (circuit court must grant landlord double rent as damages under § 704.27). Further, the record does not support the court’s reconsideration determination that Hanson wanted Thorud to remain at the property after her tenancy was terminated to repair the drywall. Rather, Hanson repeatedly requested Thorud to vacate and filed this eviction action. *See Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (factual findings will not be affirmed if unsupported by the record).

¶14 We conclude the circuit court erroneously exercised its discretion by limiting Hanson’s holdover award. Hanson is entitled to unpaid rent for each day in August that Thorud remained in possession of the property before her tenancy was terminated and double rent for each day Thorud remained in possession of the property as an unlawful holdover tenant.

¶15 Specifically, Hanson is entitled to unpaid rent for the first six days of August, which, prorated at \$15 per day, amounts to \$90. This time period consists of August 1, the day he gave notice to pay or vacate, plus the five days after August 1 during which Thorud could pay her rent or vacate.<sup>4</sup> *See* WIS. STAT. § 704.17(1)(a). As for wrongful holdover, although the circuit court’s original award of twenty-six days’ unpaid rent appears to reflect a factual determination that Thorud vacated the property on August 26, nothing in the record supports that determination. *See Noll*, 115 Wis. 2d at 643. Both Hanson and Thorud testified at the eviction hearing that Thorud vacated and turned in her keys on August 23. As a result, we conclude Hanson is entitled to wrongful holdover damages for seventeen days—from August 7 through August 23. At a WIS. STAT. § 704.27 doubled daily rate of \$30 per day, Hanson’s wrongful holdover award amounts to \$510. Hanson’s total award for unpaid rent and holdover damages equals \$600. We therefore modify the court’s damage award from \$450 to \$600 and, as modified, affirm.

¶16 Finally, we also agree with Hanson that the circuit court was without authority to order the unpaid rent and holdover award be deducted from Thorud’s security deposit. Although a landlord may withhold unpaid rent from a security deposit, *see* WIS. STAT. § 704.28(1)(b), § 704.28(4) gives the landlord twenty-one days after the tenant vacates the property to determine how to apply the security deposit. At the time of the eviction hearing, the twenty-one-day time period had not yet run. Hanson was entitled to first determine whether he needed to apply the

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<sup>4</sup> Although we observe Hanson’s notice stated Thorud needed to cure her default or vacate the property by August 6, 2013, WIS. STAT. § 704.17(1)(a) provides that a tenant must have “at least 5 days after the giving of the notice” to pay the rent or vacate.

security deposit to repair any damage to the unit. The circuit court was without authority to choose for Hanson how he would apply the security deposit. The full amount of the judgment shall be entered against Thorud.

¶17 Pursuant to WIS. STAT. RULE 809.25(1), costs are awarded to Hanson.

*By the Court.*—Judgment and order modified and, as modified, affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.



